FILE COPY

No. 712

JAMES R. BROWN

# In the Supreme Court of the United States

OCTOBER TERM, 1960

UTAH CITIZENS RATE ASSOCIATION and STRUCTURAL STEEL & FORGE CO.,

*Appellants,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC RAILROAD COMPANY,
UTAH RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,

*Appellees.*

On Appeal from the United States District Court for the District of Utah

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

CALVIN L. RAMPTON
*Counsel of Record for Appellants*
721 Continental Bank Building
Salt Lake City, Utah

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SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC RAILROAD COMPANY,
UTAH RAILWAY COMPANY;
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
*Appellees,*

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On Appeal from the United States District Court
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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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The United States of America and the Interstate Commerce Commission and also the respondent railroads have filed motions to affirm in the above entitled cases. Both of these

motions purport to be based upon the ground that the questions presented in the jurisdictional statement of the appellants are so unsubstantial as not to need further argument.

In the rather strenuous efforts made in these briefs, particularly the railroads' brief, to establish that the questions we raise are unsubstantial, the respondents succeed only in pointing up the fact that the questions raised are very substantial and are such as to warrant the attention of this court.

*The Effect of the Transportation Act of* 1958

Both the Interstate Commerce Commission order and the decision of the court take the position that the amendments to Section 13 of the Interstate Commerce Act effectuated by the Transportation Act of 1958 relieve the Interstate Commerce Commission of the obligation in an application for a freight rate increase of giving any consideration to the effect of a passenger deficit.

On page 3 of the Interstate Commerce Commission order, the Commission takes cognizance of the requirement of this court in Public Service Commission of Utah v. United States, 346 U.S. 421, 2 L.ed. 2nd 886 that they consider in arriving at their findings the effect of "the revenues derived from, or the conditions incident to, intrastate passenger operations." As a reason for departing from the requirement of this court, they cite the 1958 Amendment.

Likewise the court below cited these amendments as a basis for holding that the Commission need not concern itself with passenger operations, which admittedly it did not do. This same position is taken by the railroads in their brief on pages 21 and 22. The government in its brief states in regard to the necessity of inquiring into passenger operations

both the Commission and district court correctly ruled that the 1958 amendments to Section 15 (4) of the Interstate Commerce Act made such inquiry unnecessary.

It is our position as set forth in our jurisdictional statement that such interpretation of the act is not warranted. We represent to the court that, while our interpretation of this act is not in accord with the Interstate Commerce Commission or the court below, it is by no means far fetched. It is a matter which has not been determined by this court, and which is certainly of wide public interest. This court, therefore, should take jurisdiction of this appeal for the purpose, if no other reason exists, of deciding whether or not the amendments to the Transportation Act of 1958 obviate the necessity of the commission, in a case of this type, giving consideration to the effect of the passenger deficit as it affects the reasonableness of both interstate rates and intrastate rates.

*Density*

From the record these things are clear in regard to density of traffic:

1. The total Utah traffic is made up of a greater percentage of interstate than it is of intrastate traffic.

2. The total density of traffic within the state of Utah is much greater than the density systemwide on the respondent roads.

3. Operating ratios for total Utah traffic are much more favorable than for systemwide traffic.

4. There is no reliable breakdown of operating ratios between Utah intrastate traffic and that portion of interstate traffic within the state of Utah.

The evidence in this regard is no different than it was when this case was previously before this court, except as to the breakdown in the state of Utah between interstate and intrastate volume. We have pointed out in our jurisdictional statement why we felt that this particular breakdown is not persuasive. We have shown that it is not the type of study relied upon by the court in the previous case, nor is it the type of study recommended by Mr. Justice Frankfurter in his dissenting opinion.

The question of whether or not the showing as to relative density of intrastate and interstate traffic within the state of Utah is sufficient to overcome the showing that total Utah traffic is much more favorable than systemwide traffic is certainly a question of substance which this court should consider in view of the holding in Public Service Commission of Utah v. United States, supra.

*Terminal Costs*

It is conceded by all that there is no study showing the application of terminal costs as to interstate and intrastate costs, except that showing which may arise from the separation of total costs by the North Carolina formula. The question of whether or not the Commission may base a finding to the effect that terminal costs are not more favorable to interstate than to intrastate traffic upon evidence which it characterized as "unreliable for the purpose intended" is a question of substance which warrants this court in taking jurisdiction of the appeal.

*Comparative Rates*

The question of whether or not the railroads introduced evidence from which it could be found that Utah intrastate

rates were not already as high or higher than interstate rates without any further increases was a question of enough substance to cause one of the Interstate Commerce Commissioners to dissent in the decision. We wish to quote against from the dissent of Commissioner Freas as follows:

> "If it is conceded that intrastate costs here are at least as high as interstate costs for similar traffic units, it is not established that unit revenue derived from the intrastate traffic is not also higher than that derived from interstate traffic."

Certainly if the evidence is as Commissioner Freas says it is, then the order should be set aside. Whether or not the evidence is as Commissioner Freas says it is, is a question of great substance.

Because of the treatment which the railroad respondents have given comparative rates in their brief, we feel that we must go into this matter in more detail. The railroads first attempt to rely on Exhibit I-CR to the effect that the railroads average revenue per ton mile on interstate traffic is higher than their average per ton mile on Utah intrastate traffic. This is true, but for a reason which the railroads do not mention. The record is replete with evidence that Utah's consist of traffic is much heavier weighted percentage wise in favor of heavier loading, lower revenue, lower cost products of the mine than is the systemwide consist of traffic of the same railroads. It is to be expected that the average per ton mile revenue from products of the mines will be lower than the average per ton mile revenue from box car traffic, but the cost of handling it is also lower. In order to get a comparison that means anything, it is necessary to compare rates on like commodities interstate and intrastate. This it is possible to do from the record.

On page 24 of their brief, the railroads state:

> "Counsel refers to Exhibit 9 CR through 20 CR and argues that if the examples therein contained are reduced to a revenue per mile basis, then in the great majority of cases the car-mile earnings on intrastate rates are substantially higher than the car-mile earnings on interstate rates. Counsel has pointed to not one single example from any of such exhibits, and the exhibits show exactly the contrary."

In view of this statement, we wish to point out examples from all exhibits CR 12 through CR 20. In most of these exhibits the interstate rates selected are for much longer distances than the intrastate rates, and we agree that normally on a ton mile basis the longer the haul the lower the rate per ton mile. However, the railroads bear the burden of proof. Taking their own exhibits, we have selected the longest intrastate haul of a given commodity and the shortest interstate haul of a given commodity to get as accurate a comparison as possible. The result of this study is shown on Appendix A. It shows that in most cases the car mile earnings of the railroads were higher on intrastate traffic before the increases were applied, and in every case with the increases applied that the car mile earnings on intrastate traffic are substantially higher.

Exhibit 57 introduced by the protestants before the Interstate Commerce Commission covers LCL shipments out of Salt Lake City to various points in the state of Utah, and also to various points in the state of Idaho. This exhibit shows that the intrastate rates for comparative distances were generally higher before the intrastate increases were applied than were the interstate rates including all the increases.

The following are typical examples:

| From | To | Distance | Rate Per 100 Lbs. |
|---|---|---|---|
| | I. PAINT | | |
| Salt Lake City, Utah | Thompson, Utah | 217 | 1.69 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.06 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 1.25 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.24 |
| | II. REFRIGERATORS | | |
| Salt Lake City, Utah | Thompson, Utah | 217 | 2.53 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.49 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 1.80 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.69 |
| | III. RADIOS AND TELEVISION SETS | | |
| Salt Lake City, Utah | Thompson, Utah | 217 | 2.92 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.06 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 1.25 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.24 |
| | IV. DRUGS | | |
| Salt Lake City, Utah | Thompson, Utah | 217 | 2.53 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.78 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 2.11 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.98 |
| | V. BUILDERS HARDWARE | | |
| Salt Lake City, Utah | Thompson, Utah | 217 | 2.53 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.49 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 1.80 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.80 |
| | V. CANNED GOODS | | |
| Salt Lake City, Utah | Thompson, Utah | 217 | 1.69 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.06 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 1.25 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.24 |

VII. ROOFING

| | | | |
|---|---|---|---|
| Salt Lake City, Utah | Thompson, Utah | 217 | 1.69 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.06 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 1.25 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.24 |

VIII. MACHINER

| | | | |
|---|---|---|---|
| Salt Lake City, Utah | Thompson, Utah | 217 | 2.53 |
| Salt Lake City, Utah | Pocatello, Idaho | 170 | 1.06 |
| Salt Lake City, Utah | Idaho Falls, Idaho | 221 | 1.25 |
| Salt Lake City, Utah | Rock Springs, Wyo. | 227 | 1.24 |

Exhibit 58 shows the following in regard to coal with the intrastate rates including only the Ex Parte 175 increases and the interstate rates including all increases:

| From | To | Distance | Rate Per Ton | Revenue Per Ton Mile |
|---|---|---|---|---|
| Castle Gate, Utah | Preston, Idaho | 251 | $3.32 | 1.323c |
| Castle Gate, Utah | Park City, Utah | 219 | 3.48 | 1.589c |
| Castle Gate, Utah | Dayton, Idaho | 222 | 3.32 | 1.495c |
| Castle Gate, Utah | Devils Slide, Utah | 183 | 3.48 | 1.902c |

Exhibit 59 shows a like study on building blocks as follows:

| | | | Rate Per 100 Lbs. | |
|---|---|---|---|---|
| Salt Lake City, Utah | Pocatello, Idaho | 170 | .313 | 3.647 |
| Salt Lake City, Utah | Fillmore, Utah | 167 | .303 | 3.593 |
| Salt Lake City, Utah | Sinclair, Wyo. | 352 | .41 | 2.331 |
| Salt Lake City, Utah | Cedar City, Utah | 275 | .38 | 2.764 |

One of the most striking examples of the inequitably high level of Utah intrastate rates without the increases here sought is found in Exhibit 60. This shows that the rate on

steel from Geneva, Utah, to Salt Lake City, Utah, a distance of 38 miles, was $3.25 per ton including only the Ex Parte 175 increases, and has now been increased to $3.63. The rate on a similar shipment from Kaiser, California, to Los Angeles, California, a distance of 46 miles, is only $2.20, including all increases. The circumstances surrounding these rates are similar. Each rate applies to an 80,000 lb. minimum. In each case, the haul involved is over a flat terrain and in each case the density of traffic is heavy. Yet the railroads apply a 65% higher rate to Utah intrastate traffic than to intrastate traffic in another state.

From the foregoing, it is seen that there is ample support in the record for Commissioner Freas' dissent from the Interstate Commerce Commission Order on the basis of the railroads' showing as to comparative rate levels before the intrastate increase but including the increase on interstate rates.

*Conclusion*

Counsel submits that the questions here presented are not only substantial, but are questions of such far reaching public importance as to warrant the time and attention of this court in considering this matter and rendering a decision thereon.

Respectfully submitted,

CALVIN L. RAMPTON
*Counsel of Record for Appellants*
721 Continental Bank Building
Salt Lake City, Utah

## PROOF OF SERVICE

I, CALVIN L. RAMPTON, attorney for the appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ..... day of March, 1961, I served copies on the foregoing Brief in Opposition To Motion to Affirm on the several parties thereto as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with air mail postage prepaid, to Robert W. Ginnane, Esq., Gen. Counsel, and to Charles H. Johns, Assistant Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the intervening defendants by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective counsel of record as follows:

To:

Bryan P. Leverich, Esq.
A. U. Miner, Esq.
Union Pacific Annex
Salt Lake City, Utah

Elmer B. Collins, Esq.
Union Pacific Railroad
Omaha, Nebraska

L. W. Hobbs, Esq.
Union Pacific Railroad
1416 Dodge Street
Omaha, Nebraska

Ernest Potter, Esq.
Rio Grande Bldg.
Denver, Colorado

Albert R. Bowen, Esq.
Deseret Bldg.
Salt Lake City, Utah

S. N. Cornwall, Esq.
65 So. Main
Salt Lake City, Utah

Walter G. Treanor, Esq.
Western Pacific Railroad
526 Mission Street
San Francisco 5, Calif.

CALVIN L. RAMPTON
721 Cont'l Bank Bldg.
Salt Lake City, Utah
*Attorney for Appellants*

## APPENDIX A

| Line No. | Page No. | From | To | Miles | Rate Before Increase | Car Mile Earning | Present Rate | Car Mile Earning |
|---|---|---|---|---|---|---|---|---|
| *Exh. 12 Cr* | | *Clay and Bentonite* | | | | | | |
| 25 | 2 | Denver, Colo. | Salt Lake City, Utah | 570 | .65 cwt | .707 | .65 cwt | .707 |
| 8 | 1 | Ivie, Utah | Geneva, Utah | 115 | 3.18 nt | 1.337 | 4.35 nt | 1.828 |
| *Exh. 13 Cr* | | *Gravel and Sand* | | | | | | |
| 2 | 2 | Boise, Ida. | Provo, Utah | 452 | 6.03 nt | .667 | 6.03 nt | .667 |
| 5 | 1 | Cedar City, Utah | Salt Lake City, Utah | 275 | 3.33 nt | .628 | 4.42 nt | .833 |
| *Exh. 14 Cr* | | *Limestone (Lime Rock)* | | | | | | |
| 1 | 2 | Victorville, Calif. | Salt Lake City, Utah | 671 | .47 cwt | .283 | .47 cwt | .283 |
| 2 | 1 | Cisco, Utah | Garland, Utah | 201 | 2.21 nt | .654 | 2.95 nt | .873 |
| *Exh. 15 Cr* | | *Gasoline* | | | | | | |
| 1 | 3 | Boise Junction, Ida. | Salt Lake City, Utah | 407 | .59 cwt | .768 | .59 cwt | .768 |
| 6 | 1 | Pioneer, Utah | Cedar City, Utah | 281 | .41½ cwt | .790 | .49 cwt | .933 |
| *Exh. 16 Cr* | | *Fuel Oil, Distillate, Etc.* | | | | | | |
| 2 | 3 | Oakland, Calif. | Ogden, Utah | 775 | .91 cwt | .849 | .91 cwt | .849 |
| 2 | 1 | Pioneer, Utah | Cedar City, Utah | 281 | .35 cwt | .837 | .47 cwt | .984 |
| *Exh. 17 Cr* | | *Iron or Steel* | | | | | | |
| 5 | 3 | Minnequa, Colo. | Hiawatha, Utah | 533 | .73 cwt | 1.435 | .73 cwt | 1.435 |
| 11 | 1 | Geneva, Utah | International, Utah | 85 | 5.44 nt | 2.818 | 7.44 nt | 3.854 |
| *Exh. 19 Cr* | | *Molasses* | | | | | | |
| 1 | 2 | Lincoln, Idaho | West Jordan, Utah | 239 | 5.39 nt | 1.325 | 5.39 nt | 1.325 |
| 6 | 1 | Lewiston, Utah | Salt Lake City, Utah | 126 | 2.72 nt | 1.270 | 3.72 nt | 1.737 |
| *Exh. 20 Cr* | | *Beet Pulp* | | | | | | |
| 1 | 3 | Lincoln, Idaho | Madsen, Utah | 159 | .26 cwt | .747 | .26 cwt | .747 |
| 3 | 2 | West Jordan, Utah | Greenwood, Utah | 164 | .22 cwt | .704 | .30 cwt | .959 |